

5. HOLLISS AVENUE – REPAIR AND POSSIBLE ROAD LEGALISATION

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The purpose of this report is to advise the Board of the various options available to the Council in relation to land at the end of Holliss Avenue, and to seek support from the Board regarding recommendations to be made to the Council's Annual Plan Subcommittee regarding a preferred option.

EXECUTIVE SUMMARY

The Heathcote County Council approved a 14-lot subdivision of land at the end of Holliss Avenue in the 1980s. A copy of the relevant plan is attached. The Council owns Lot 14. Lots 1 to 13 are in private ownership. The subdivision was approved on the basis that:

- (a) lots 1 to 13 would be serviced by a right of way over Lot 14; and
- (b) a covenant would be registered against the titles to Lots 1 to 13 preventing subdivision until such time as Lot 14 is formed and sealed to the appropriate standard for it to be accepted as road.

The right of way easement and covenant were registered on the certificates of title for Lots 1 to 14 at the time of subdivision, so that all purchasers of Lots 1 to 13 should have been aware of the terms of the easement and covenant at the time of purchase.

A number of residents have complained that Lot 14 is in a state of disrepair and have requested that Lot 14 be upgraded to legal road.

The cost of upgrading Lot 14 to legal road is likely to be \$250,000 inclusive of GST. This sum is presently unbudgeted.

This particular subdivision is very unusual, as the Council owns the land which is subject to the right of way, there is a covenant preventing subdivision prior to the legalisation of Lot 14 as road and there is a public reserve at the end of Lot 14 (which is accessed via Lot 14 from time to time).

There are a number of options available to Council. Officers have met with a large number of Holliss Avenue residents and have written to all of the residents seeking their feedback on various options. Of the options presented to residents, most residents have said that they would like Lot 14 to be upgraded to legal road and that they would be prepared to pay for that upgrade through a targeted rate.

BACKGROUND

The subdivision and usual practice

The Heathcote County Council approved a 14-lot subdivision of land at Holliss Avenue in the 1980s, on the basis that Lots 1 to 13 would be serviced by right of way over Lot 14 and a covenant would be registered against the titles to Lots 1 to 13, preventing subdivision until such time as Lot 14 is formed and sealed as road.

The covenant, and the terms of the right of way, made clear on the face of the certificates of title to Lots 1 to 13 that not only was Lot 14 not legal road, but also that the owners of Lots 1 to 13 were responsible for repairs and maintenance and/or the costs of legalisation.

The Council must allow the owners of Lots 1 to 13 access over Lot 14 in accordance with the rights of way registered against the land. Such rights are, however, "*in common*" with the Council, ie the Council can for itself and its invitees have rights of access over Lot 14. Accordingly, the Council may authorise public access over Lot 14. That access may be authorised by vehicle or by foot and might be limited to particular hours of the night or day. Any such rights of public access as are permitted by the Council must not hinder use of the right of way by the owners of Lots 1 to 13.

Subdivisions are often approved on the basis that sections will be serviced by a right of way. However, this usually leaves lot owners with ownership of the right of way and the obligation to maintain their right of way access at their expense. The Council does not normally contribute to private rights of way.

The reasons for this were set out in a report to the October 2002 Council meeting (via the Sustainable Transport and Utilities Committee) headed "Responsibility for Maintenance and Renewal of Services located in Private Rights of Way".

The Holliss Avenue situation is, however, very unusual as the Council owns the land which is subject to the right of way, there is a covenant preventing subdivision prior to the legalisation of Lot 14 as legal road, and there is a public reserve at the end of Lot 14 which is accessed via Lot 14 from time to time.

Residents' Concerns

A number of residents have complained that Lot 14 is in a state of disrepair and have requested that Lot 14 be upgraded to legal road. It appears that residents have been unable to successfully reach agreement among themselves as to the level of works required and how the cost of those works should be shared between them, despite the cost sharing mechanism being set out in the easement certificate. The easement certificate records that the costs of installation, maintenance and repair of the right of way shall be apportioned on the basis of percentage of road frontage. A number of residents have therefore requested the Council's assistance (both financially and as a facilitator).

A number of residents argue that the Council should assist in resolving this matter (legalising Lot 14 as legal road) as:

- (a) the Council owns Lot 14;
- (b) Lot 14, from a physical perspective, looks like legal road and is therefore used by the public from time to time to access the Port Hills;
- (c) although the right of way and covenant were clearly registered on their certificates of title at the time of the purchase, they were not fully advised by their solicitors regarding the implications of the right of way and covenant; and
- (d) the covenant is presently preventing the further subdivision of Lots 1 to 13, which would then create the potential for subdivision of at least some of Lots 1 to 13 (subject to the usual subdivision consent process).

Officers do not see the first and third arguments as being good reasons for the Council to become involved in what (essentially) is a private right of way matter, but officers do acknowledge that the public does from time to time use Lot 14 and that there may be an increase in rates revenue if there is any future subdivision of Lots 1 to 13 (although such subdivisions would still be subject to the usual subdivision consent process).

A subdivision consent has already been given in respect of Lot 6 on the attached plan. The subdivision cannot, however, be completed prior to the legalisation of Lot 14 as road.

Legal position

The Council is not legally obliged to vest Lot 14 as road, nor is it legally obliged to carry out any repairs on the right of way. It may do these things, but it is not required to do so.

The covenant and right of way are clearly recorded on the certificates of title for Lots 1 to 14 (inclusive). Landowners should therefore have been aware of their terms prior to purchase. If they were not, then this is a matter which the landowners should address with their professional advisers. It is not a matter for which the Council is responsible.

The cost and design

The Council's City Streets Unit has prepared a draft plan (copy attached) showing the works that it believes are appropriate for the upgrade of Lot 14 to legal road. These works are likely to cost approximately \$250,000 inclusive of GST. This includes the provision of a footpath.

The cost of simply repairing Lot 14 (but leaving it as a right of way) is likely to be \$50,000 inclusive of GST.

ISSUES

The issues for the Council are:

- (a) whether it wants to do any works on Lot 14;

- (b) if it does want to do works on Lot 14, whether the work should be simply maintaining the right of way or upgrading it to legal road; and
- (c) if it wants to upgrade Lot 14 to legal road, how those upgrade works would be funded and whether the Council should make a contribution to the upgrade works/costs.

OPTIONS

Five key options have been identified:

Option 1 – Do nothing (except for enforcing the covenant)

As mentioned above, the Council is not obliged legally to do anything in respect of the right of way. It has no obligation under the terms of the right of way, nor the covenant, to make any contribution towards repair, maintenance or legalisation. The Council often gets asked to assist in maintaining and repairing rights of way. The Council’s policy, consistently applied, is that it will not do so since general principles of administrative law discourage the expenditure of public money on projects for which there is no public benefit, only private benefit. Here, though, there arguably is some public benefit in having Lot 14 vest as legal road.

If Council chooses this option, Council officers strongly recommend that the Council enforce the covenant against further subdivision so long as Lot 14 is not vested as road. The covenant arose as a condition of subdivision consent. Ratepayers are entitled to expect that the Council will enforce its district plan, and resource consents granted under the district plan.

Advantages	Disadvantages
<p>The Council does not incur any costs, except enforcement costs if a landowner attempts to breach the terms of the covenant.</p> <p>The Council does not become involved in what is (essentially) a private right of way where landowners were given notice on their certificates of title of the terms of the easement certificate and covenant.</p>	<p>Lot 14 is left as a right of way.</p> <p>Most landowners do not want this option.</p> <p>One landowner already has a subdivision consent. Will be costly for Council to enforce the covenant if the landowner pursues subdivision.</p> <p>Does not recognise that the public uses Lot 14 from time to time.</p> <p>Subdivisions of Lots 1 to 13 are prohibited, even if a subdivision consent under the City Plan can be obtained.</p>

Option 2 – Co-ordinate right of way repairs

An alternative is for Council to do nothing but to accept responsibility for co-ordinating repairs and maintenance to the existing right of way and the collection and payment of costs by the various owners. The residents, however, could achieve the same outcome by employing their own project manager for that purpose. This option also would not achieve a long term solution as there are landowners who will want to subdivide their property (which they cannot do until Lot 14 becomes legal road) and the right of way will require further maintenance in the future. Officers do not favour this option.

Advantages	Disadvantages
Comparatively little cost to the Council.	<p>Lot 14 is left as a right of way.</p> <p>Most landowners do not want this option.</p> <p>One landowner already has a subdivision consent. Will be costly for Council to enforce the covenant if the landowner pursues subdivision.</p> <p>Does not recognise that the public uses Lot 14 from time to time.</p> <p>Subdivisions of Lots 1 to 13 are prohibited, even if a subdivision consent under the City Plan can be obtained.</p> <p>Administrative costs of Council to co-ordinate the repairs and recover the costs.</p>

Option 3 – Some residents act

Under this option some, but not all, of the residents of Holliss Avenue may agree to meet the costs of upgrading Lot 14 and then inviting the Council to vest Lot 14 as road. In such circumstances:

- (a) the Council could make a contribution in recognition of the fact that there is some public benefit in having Lot 14 vest as legal road (through enabling public access to the Council reserve at the end of Lot 14 and removing the impediment to any potential for subdivision, which would be a benefit in terms of future rates revenue);
- (b) targeted rating (discussed below) would not be available; and
- (c) residents' contributions would be required to be paid in cash, up front.

The benefit of this option is relative simplicity. It would allow those residents participating to determine the basis upon which they would share the costs amongst themselves. The easement certificate contemplates the Council vesting Lot 14 once upgrading work is done.

There has been discussion with residents of the extent to which, if at all, the Council might contribute to the costs of upgrading and vesting of Holliss Avenue. Again, the starting point for this discussion is the right of way created by the easement certificate which is registered against the certificates of titles for Lots 1-14 (inclusive). That document does not provide for any Council contribution towards costs of *"installation, maintenance and repair"*. This is to be contrasted with the normal circumstances for repair and maintenance, as set out in the Ninth Schedule of the Property Law Act 1952, where all persons entitled to use land subject to a right of way (which includes the Council) are expected to make a reasonable contribution to its repair and maintenance. The terms of the easement certificate make clear that irrespective of any use of the right of way by the Council the costs of maintenance fall entirely on the owners of Lots 1 to 13.

As mentioned above, it is recognised that the circumstances of Council ownership of Lot 14 (the land over which the right of way is established) are very unusual. There is public benefit arising from pedestrian access over Lot 14 to the Council reserve at the top of Lot 14 and a potential future benefit arising from the removal of any impediment to the subdivision of Lots 1 to 13 (being a potential benefit in terms of future rates revenue).

If the Council wants to make a contribution under this option, officers would recommend that it contribute towards the cost of forming and vesting Lot 14 by:

- (a) making a cash contribution of 15% of the cost up to \$250,000;
- (b) meeting payment of any cost over-runs in excess of \$250,000; and
- (c) providing project management services.

Advantages	Disadvantages
<p>Lot 14 vests as legal road.</p> <p>The cost of having Lot 14 vest as legal road is met by those receiving the benefit of the road.</p> <p>Avoids potential enforcement costs in relation to the covenant.</p> <p>Recognises public use of Lot 14.</p> <p>Means Lots 1 to 13 will be subject to the usual City Plan provisions, rather than also being subject to the blanket prohibition on subdivision contained in the covenant.</p>	<p>This is not the preferred option of most residents and is unlikely to be co-ordinated by them.</p>

Option 4 – All residents contribute (targeted rate)

Under this option the owners of all of the lots would participate in the funding of the cost of upgrading and vesting Lot 14 as road. In those circumstances:

- (a) the Council could make a cash contribution in recognition of the public benefit in having Lot 14 vest as legal road (in the same way as outlined under Option 3);
- (b) Council could use targeted rating as a means to fund the cost of the work; and
- (c) those owners wishing to make a lump sum contribution, in whole or in part, could do so.

There has been some discussion with residents on the basis upon which a targeted rate might be used to assist the funding of the work on Holliss Avenue. Attached to this report is a spreadsheet showing details of a proposed targeted rate based on an overall cost of \$250,000 inclusive of GST. The calculation assumes a repayment basis of either 10 or 15 years with interest at 7%, fixed for the first 10 or 15 years (as applicable). The amount of the targeted rate, however, could be adjusted up or down depending on the level of capital contribution made by owners towards final costs. If a targeted rate is chosen as a funding option, then officers would recommend to Council that a specific entry be made in the file for each of the Holliss Avenue properties recording that there is a targeted rate for roading applying to that property. This note would then result in an entry on a Land Information Memorandum issued to any prospective purchaser of the property. Officers would also request that residents enter into a deed recording their agreement that the balance of the contribution due for that property and not yet repaid through the targeted rate will be repaid in full on the sale of the whole or any part of the property (although this is not something that the Council can insist upon). The reason for this recommendation is that buyers of property in Christchurch do not expect to be assuming a liability for a targeted rate in respect of road access. Officers believe that this liability should fall first upon the current owners. While it is acknowledged that some of the current owners may have purchased in ignorance of the circumstances relating to liability to repair and maintain the existing right of way, that is not something for which the Council is responsible. If residents have been let down by their professional advisers, then that is a matter they should address to those advisers directly.

Advantages	Disadvantages
<p>Lot 14 vests as legal road.</p> <p>The cost of having Lot 14 vest as legal road is met by those receiving the benefit of the road.</p> <p>Avoids potential enforcement costs in relation to the covenant.</p> <p>Recognises public use of Lot 14.</p> <p>Means Lots 1 to 13 will be subject to the usual City Plan provisions, rather than also being subject to the blanket prohibition on subdivision contained in the covenant.</p> <p>Most landowners want the Council to impose the targeted rate.</p>	<p>Do not want to set a precedent which would require the Council to enter into targeted rates on other matters (although the risk of this is extremely low due to the unusual circumstances of this particular subdivision).</p> <p>The Council has the administrative responsibility of managing and levying the targeted rate.</p> <p>There are three landowners in Holliss Avenue who do not want the targeted rate. They bought their properties expecting to pay their share of costs based solely on the easement certificate and covenant. They argue that the landowners with the potential for subdivision are the parties getting the benefit, and not them.</p>

Option 5 – Council vests land as road

The Council could simply vest Lot 14 as legal road now, and either pay for the upgrade in the 2003/04 financial year or in future years as budget allows. There may be potential to recover some costs upon any subdivision of Lots 1 to 13, although this is likely to be very limited. In reality, if the Council vests the land as road then it would need to do the upgrade works in the short term and could not practically wait in the hope of trying to shift the upgrade costs to the subdivider.

Although Council could pay the full cost of upgrading the road, it should be noted that:

- (a) the Council has no legal obligation to do so;
- (b) residents should have been aware of their obligations in regard to Lot 14 at the time they purchased (as the easement certificate and covenant were registered on the certificates of title for Lots 1 to 13 at the time of subdivision);
- (c) officers are keen to avoid setting any precedent which would require the Council to expend money in the future;
- (d) there is no budget allocation for the upgrade works (estimated to cost \$250,000 inclusive of GST); and
- (e) there is relatively little public benefit in having Lot 14 vest as legal road; the benefit falls mainly to the owners of Lots 1 to 13 (and any other neighbouring land that gains access to the legal road via any of Lots 1 to 13).

Advantages	Disadvantages
<p>Would please residents.</p>	<p>Will cost the Council approximately \$250,000 inclusive of GST.</p> <p>There is relatively little public benefit in having Lot 14 vest as legal road.</p>

POTENTIAL CONTRIBUTION FROM YULLUNDRI

In March 2002, an owner of land on the western side of Bowenvale Valley (Yullundri Pastoral and Land Development Co Limited) filed proceedings in the High Court at Christchurch under the Property Law Act seeking relief under the landlocked land provisions of the Property Law Act for access to its land from Bowenvale Avenue across adjoining land owned by Smith Developments Limited and F N and A M C Curtis. The basis of the claim is that Yullundri's land is landlocked and access across the Smith Developments Limited land is necessary.

The Court has scheduled a telephone conference for 10 March 2003 to further consider the issue. There has been a suggestion that it would be logical for the road access through the Yullundri property to ultimately connect to Holliss Avenue through land owned by Netheravon Holdings Limited at a point somewhere near the common boundary of Lots 4 and 5. The proposals are in a very embryonic form. There has not as yet been any geotechnical investigation to ascertain whether a road constructed in the suggested position is either physically or financially viable.

The Council believes that it does not have any legal obligation to provide access to Yullundri's land. As the local authority, the Council is always served with Property Law Act applications and so is a party to the proceedings.

Access to the Yullundri land has been an ongoing matter of friction between Yullundri and the Council for a number of years.

If this route off Holliss Avenue was technically feasible and providing legal access could be obtained, this would have the benefit of resolving the High Court proceedings and resolving the friction between the Council and Yullundri. However, the Council should not take Yullundri's application into account when deciding whether or not to set a targeted rate. This is because the Council has no legal liability to Yullundri. The Council should only take Yullundri's application into account if it is considering Option 5.

RESIDENTS' RESPONSES

The first four options detailed above were put to the residents for their feedback. Option 5 was not presented to residents as it was not favoured by officers, but we anticipate that residents would strongly support that option.

At the date of writing this report, responses have been received as follows:

	Option 1	Option 2	Option 3	Option 4
First Choice	2	1		10
Second Choice*			6	

*Most residents only specified their first choice. The six residents that specified a second choice all had Option 4 as their first choice and Option 3 as their second choice.

CONCLUSION

This is an unusual and complex situation and whatever option is adopted, some landowners will feel disadvantaged.

Options 1 and 2 leave Lot 14 as a right of way and will preclude any further subdivision. There may be costs to the Council in enforcing the covenant and there is no recognition of the public use of Lot 14 for access to the reserve.

Option 3 provides for those landowners who want to see the road upgraded to agree to a cost sharing method and to proceed on their own. It allows for a Council contribution but will require the owners to meet the costs in a lump sum before any work is done. Officers believe this would be a considerable challenge to the landowners and is unlikely to proceed.

Option 4 represents a reasonable compromise with the residents meeting the majority of the costs of the work needed to upgrade the right of way to legal road. Council would provide some of the costs and act as banker for the project by funding the work and then recovering the residents' share through a targeted rate.

A clear majority of the landowners have indicated a preference for Option 4.

Staff

Recommendation:

That the Spreydon/Heathcote Community Board recommend to the Annual Plan Subcommittee that:

- (1) The Council set a targeted rate to cover the costs of upgrading Lot 14 to legal road.
- (2) The amount to be recovered through the targeted rate be capped at \$212,500 (inclusive of GST), plus the interest cost referred to below over a term of 15 years.
- (3) The Council make a cash contribution of 15% of the cost up to \$250,000 (inclusive of GST).
- (4) The Council meet payment of any cost over-runs in excess of \$250,000 (inclusive of GST).
- (5) The Council provide project management services at no cost to the project.
- (6) The Council hold the interest rate on any targeted rate at a fixed amount of 7% for up to 15 years.
- (7) Provision be made in the 2003/04 annual plan for the \$250,000 capital cost (City Streets – new construction).

Chairperson's

Recommendation:

For discussion.