



7. REDCLIFFS FORESHORE - PART RURAL SECTION 309 - ADVERSE POSSESSION CLAIM BY R G AND C ROMERIL

General Manager responsible:	General Manager Regulation and Democracy Services
Officers responsible:	Legal Services Manager, Acting Greenspace Manager
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PURPOSE OF REPORT

1. To seek Council's approval for the initiation, if required, of legal proceedings to establish that a subdivision consent under the Resource Management Act is required in respect of the Romeril application for "adverse possession" of part of Rural Section 309. If such consent is required and granted the expected outcome is that the land will vest in the Council as esplanade reserve.

EXECUTIVE SUMMARY

2. There exists along the foreshore between Beachville Road and Main Road in Redcliffs a strip of land legally described as Part Rural Section 309 held under the "deeds" system of land registration.
3. Roderick Grant Romeril and Claire Romeril, the owners of the property at 133 Main Road, Redcliffs, have made application to the Registrar-General of Land for title to part of this "deeds" land between their property and the foreshore containing an area of 163 square metres. If that application is successful a certificate of title to the land claimed will issue in the name of Mr and Mrs Romeril.
4. The Council has had some recent involvement with this strip of land along the foreshore as follows:
 - (a) On 22 June 2005 the Board resolved to approve a proposed application by the Council to the Registrar-General of Land for title to approximately 765 square metres of Part Rural Section 309 generally located around the tram shelter near the junction of Main Road and Wakatu Avenue by way of "adverse possession";
 - (b) The Council has had to deal over recent months with an application by Ian Alexander McKenzie of 149 Main Road for an application for a retrospective resource consent for an illegal structure erected by Mr McKenzie between his property and the sea on part of Part Rural Section 309. This was settled by a compromise whereby the size of the structure was reduced and public access preserved. However, importantly, by so agreeing the Council did not accept that the land upon which the structure was built was owned by Mr McKenzie.
5. In view of the high level of public interest in this strip of foreshore, it is considered that the Council should take the steps available to it to prevent the application for "adverse possession" by Mr and Mrs Romeril from proceeding. Approval is therefore sought from the Board to enable Council officers to initiate, if required, the appropriate legal proceedings to require Mr and Mrs Romeril to apply for a subdivision consent before their application for "adverse possession" of the land may be progressed by the Registrar-General of Land. It is expected that any subdivision consent would require as a condition of that consent that the land vest in the Council as esplanade reserve in accordance with the requirements of the City Plan. We have received a written assurance from the Registrar-General of Land that he will not progress the Romeril application until he either accepts that a subdivision consent is required or, if not, the Council's proposed legal proceedings in the Environment Court are determined.
6. Given the long public use and public utility of this land, the high level of public interest and the stated intentions of Government and Council to protect and enhance public access to the foreshore, the Council should act to protect the public interest. Local interest groups, including the Avon-Heathcote Estuary Ihutai Trust and the Christchurch Estuary Association, have expressed a strong interest in protecting this area for public access as a vital link from Main Road to the Estuary. Te Runanga O Ngai Tahu have been kept informed throughout this process and have been provided with opportunities to participate.

7. Developments in this matter remain fluid and it may be that matters will develop differently than presently anticipated. However, in view of the very real possibility that legal proceedings will need to be issued it is necessary to place this matter before the Council so that officers have the authority to initiate court action should this be necessary. It is important that these issues are resolved prior to the issue of any title to Mr and Mrs Romeril and once that title issues it would be very difficult to have it cancelled.

FINANCIAL AND LEGAL CONSIDERATIONS

8. Part Rural Section 309 is privately-owned land known as “deeds” land.
9. Under the deeds system of land ownership a party is able to claim ownership of land by deed (ie by written documentation) or by virtue of continuous possession. This legal form of title is a “common law” system of land ownership originating from inherited British law. The “deeds” system of land registration was replaced by the modern day land transfer system under which certificates of title issue for land. However, there are many pockets of “Deeds Land” remaining in this city.
10. The land transfer or “Torrens” system of land registration and title guarantee which exists in New Zealand today plays a very significant part in economic life and social development. In less developed countries land ownership issues are a critical impediment to social and economic development.
11. Under the common law any person may claim by “adverse possession” any part of “deeds” land which that person has occupied exclusively for a period of 12 years or more. Where such a claim can be established, the claimant may apply for a Land Transfer Act title to issue in respect of the land claimed, the effect of which is to override the rights of all other parties, including the rights of the owner of the “deeds” land.
12. This process requires an application to be made to the Registrar-General of Land. Such an application has been made in respect of that part of Part Rural Section 309 described as Lot 1 (“Lot 1”) on title Plan 359297 (a copy of which is attached to this report) by Roderick Grant Romeril and Claire Romeril. As part of the application process the Registrar-General of Land is required to advertise the application and to set a period of time by the end of which any objections to the application must be received. The due date for applications in respect of this particular application is 24 January 2004.
13. If no objections are received by the Registrar-General of Land by that date and the Registrar-General considers that the application should proceed, then he will issue to Mr and Mrs Romeril a Land Transfer Act title for the land claimed (ie Lot 1) and the land will pass to Mr and Mrs Romeril as their freehold asset. Their title thereafter will be guaranteed by the Crown.
14. The advice of the Legal Services Unit and the Council’s external solicitors, Buddle Findlay, is that the application by Mr and Mrs Romeril for “adverse possession” of Lot 1 technically constitutes a “subdivision” of land for the purposes of the Resource Management Act. Where there is a division of a piece of land by an application for the issue of a separate certificate of title for any part of the land, a “subdivision” occurs. In this case, issuing a separate title for the proposed Lot 1 constitutes a division of Part Rural Section 309 which itself constitutes an allotment as defined in section 218(2)(d) of the Resource Management Act.
15. Section 11(1) of the Resource Management Act prohibits a person from subdividing land unless that subdivision is permitted by the exceptions specified in subsections (a) to (d) of that section. The present subdivision does not appear to satisfy any of those exceptions. Therefore before the application proceeds a resource consent to subdivide should first be obtained by Mr and Mrs Romeril from Council (acting in its regulatory capacity) to permit the subdivision of Part Rural Section 309.
16. Section 224(c) of the Resource Management Act provides that no survey plan shall be deposited under the Land Transfer Act 1952 unless there is lodged contemporaneously with the Registrar-General of Land a certificate signed by an authorised officer of the Council stating that (amongst other things) it has approved the survey plan and that the conditions of the subdivision consent have been complied with or dealt with in some other way. When a survey plan “deposits” it signifies that all matters have been dealt with to enable the subdivision contemplated by the plan to be completed and at that point new titles will issue for the new allotments created by the plan. In this case, no certificate has been issued by the Council. Indeed, the Council is unable to issue such a certificate as no subdivision consent application has been made for it to consider.

17. There is no subdivision consent or a section 224(c) certificate and accordingly the survey plan to subdivide Lot 1 can therefore not be deposited. If the survey plan is deposited by the registrar nonetheless, it is our view that there will be a breach of section 224(c) of the Resource Management Act.
18. If a subdivision application were received then, to comply with the conditions of the City Plan, a condition of any consent granted would require that Lot 1 vest in the Christchurch City Council as esplanade reserve.
19. The Registrar-General of Land set 24 January 2006 as being the date by which objections to the application for "adverse possession" by Mr and Mrs Romeril must be received. The Legal Services Unit investigated the possibility of making such a formal objection but have concluded that such an objection can only be lodged and sustained if the Council can demonstrate that it has a "legal" interest in the land. The position of the Council as the relevant regulatory authority in respect of subdivision matters under the Resource Management Act does not give the Council the requisite "legal" interest in land.
20. To have such an interest the Council must have an ownership interest or an interest as mortgagee or easement holder or the like. In essence our advice is that the Council does not have the required legal interest in the land. Therefore the Council is not in the position of being able to object in the normal course to the application by Mr and Mrs Romeril for "adverse possession".
21. In the absence of any compelling evidence that the Council possesses a legal interest in the land, the only method by which the Council may "object" to the application is by enforcing the requirement of the Resource Management Act requiring a subdivision consent and the issue of a section 224(c) certificate before the "adverse possession" application may proceed.
22. The Legal Services Unit and Buddle Findlay, solicitors acting for the Council, have entered into correspondence with the Registrar-General of Land specifying the Council's concern that subdivision consent has not been obtained. The Council's legal advisers have sought an undertaking from the Registrar-General of Land that he will not proceed to process Mr and Mrs Romeril's "adverse possession" application for Lot 1 until the issue of the Council's requirement for a subdivision consent is resolved. This undertaking has been received.
23. Due to the very short timeframe available between the date of writing this report and the objection expiry date of 24 January 2006 it may be that by the time this report is considered that it may have been necessary for proceedings to have been initiated.
24. Whilst it is always difficult to quantify with any accuracy anticipated legal costs in respect of litigation, it could reasonably be expected that the costs of such an application could be of the order of up to \$30,000. The Greenspace Unit has indicated that they are able to find this money from within their current budget.

STAFF RECOMMENDATION

That the Board recommend to the Council that the Council's legal advisers, if required, prepare and file the necessary legal proceedings in the Environment Court seeking a declaration of the Court requiring that a subdivision consent be obtained in respect of the application by Mr and Mrs Romeril for "adverse possession" of Lot 1 on Plan 359297 before that plan is deposited.

CHAIRPERSON'S RECOMMENDATION

That the staff recommendation be adopted.

BACKGROUND ON REDCLIFFS FORESHORE - PART RURAL SECTION 309 - ADVERSE POSSESSION CLAIM BY R G AND C ROMERIL

25. The strip of land along the Redcliffs Foreshore known as Part Rural Section 309 is a remnant of a larger piece of land which has substantially been eroded by the sea. Rural Section 309 was subdivided for residential sections in 1895 but the remnant of land that we know today was excluded from the subdivision. It is probable that at that time the land had been inundated by the sea and that this was the reason why it was not included within the subdivision. However, subsequently some of the land appears to have been reclaimed and used for the erection of protection works against erosion by the sea.
26. You will observe from Plan SM1214-08 attached to this report that beyond Part Rural Section 309 is a strip shown as "Sec 1, SO 18207" and that this strip is substantially within the Coastal Marine Area (ie the sea). This strip was formerly legal road and was created when the original Rural Section 309 was first granted by the Crown to private owners in the 1850s. It is clear that at that time that dry land must have extended to the seaward boundary of the old legal road but must have subsequently been eroded away. This legal road has been formally stopped and is now, in respect of those parts of it below mean high water springs, owned by the Crown pursuant to the Foreshore and Seabed Act, and in respect of those parts above mean high water springs, owned the Council as local purpose reserve.
27. It appears that no party has asserted legal ownership of Part Rural Section 309 since the original subdivision in 1895.
28. In 1933 the Sumner Borough Council prepared a plan and initiated a process to take the remnant of Part Rural Section 309 under the Public Works Act, presumably for land protection works. However, this appears, for unknown reasons, to not have been proceeded with.
29. It appears that throughout the last century and to the present day that the public have used Part Rural Section as access to the foreshore around the Estuary treating it as and assuming that it was publicly owned.
30. The Board will recall that on 22 June 2005 the Board considered a report concerning part of the land known as Part Rural Section 309, in particular that part of the land generally situated around the tram shelter at the southern end of Part Rural Section 309 near the junction of Main Road and Wakatu Avenue. The recommendation, as adopted by the Board, of that report was that the Council proceed with an application to the Registrar-General of Land for a claim of adverse possession to that land generally around the tram shelter.
31. In acting upon the Board's recommendation the Legal Services Unit undertook further investigation of the processes involved and the nature of the information required to enable that application to proceed. Those investigations brought to light an inadequacy in the Council's position as proposed applicant, the result of which was further advice from the Legal Services Unit that the application could not proceed at that time. The particular issue is that for an "adverse possession" claim to be made by the Council in respect of deeds land, a period of 12 years adverse possession by the Council must be established. It became apparent on investigation by the Legal Services Unit that a period of only approximately 10 years could be established to date, although some Council involvement occurred with the land before that time. It may therefore be possible to initiate such an application in approximately two years time after the requisite 12 years have been accumulated.
32. The Council has been involved over the last year or so with respect to an application for retrospective resource consent made by the owner of the property at 149 Main Road, Ian Alexander McKenzie, in relation to an illegal structure erected on part of Rural Section 309 between the legal boundary of his property and the sea. It is possible to apply for a resource consent without owning the land to which the application relates. This application by Mr McKenzie created significant controversy and involved in opposition to it the Avon-Heathcote Estuary Ihutai Trust, the Christchurch Estuary Association Incorporated and initially the Te Runanga O Ngai Tahu amongst others.
33. The McKenzie application was dealt with by a commissioner who decided against Mr McKenzie. The matter was then appealed but resolved by agreement between the parties on the basis that consent was given for part of the structure but that public access through the foreshore was preserved by the demolition of the remaining part. No acknowledgement of any claim by Mr McKenzie as to ownership of the land was made by the Council.

34. As a consequence of the McKenzie application public interest in this stretch of foreshore has been heightened. Over recent months Council staff have received many representations from the Avon-Heathcote Estuary Ihutai Trust and the Christchurch Estuary Association Incorporated concerning issues of public access along this strip of foreshore.

OPTIONS

Preferred Option

35. To issue, if necessary, legal proceedings in the Environment Court seeking a declaration of the Court requiring the Mr and Mrs Romeril to obtain a subdivision consent under the Resource Management Act in respect of Lot 1 before their application for “adverse possession” is permitted to proceed.

Status Quo

36. Not to issue the legal proceedings.

If no legal proceedings are issued, then the Council will not be in a position to object or oppose the application by Mr and Mrs Romeril for “adverse possession” of Lot 1. The risk is that in that event the Registrar-General of Land will process the application and a freehold certificate of title under the Land Transfer Act will issue to Mr and Mrs Romeril for Lot 1, the effect of which will be to change the status of the land from “deeds” land to land transfer land and to thereby prevent public access to it. The title to Lot 1 will then be guaranteed by the Crown and it will be very difficult to dispute it.

The Council is very likely to come under a great deal of public criticism if it takes no action to attempt to protect public access to and along the Estuary foreshore.

ASSESSMENT OF OPTIONS

The Preferred Option

37. To proceed, if required, with an application to the Environment Court for a declaration requiring Mr and Mrs Romeril to apply for a subdivision consent in respect of Lot 1 Deposited Plan 359297 before their “adverse possession” application to the Registrar-General of Land is processed.

	Benefits (current and future)	Costs (current and future)
Social	<ul style="list-style-type: none"> Ensuring the integrity of the City Plan is maintained by enforcing the requirement for a subdivision consent under the Resource Management Act. Ensuring that the public have continued access around the Estuary through the medium of requiring as a condition to any subdivision consent the creation and vesting in the Council of an esplanade reserve which will be over the entirety of the land claimed by “adverse possession” by Mr and Mrs Romeril. Ensuring that the community’s aspirations that this land be brought under public ownership are met. Ensuring that a precedent is set for dealing with any other claims by landowners neighbouring Part Rural Section 309 (ie preventing such further claims). 	<ul style="list-style-type: none"> The denial of Mr and Mrs Romerils’ “adverse possession” claim to Lot 1 DP 359297. The denial of the claims for “adverse possession” of any other person because the Romeril application is considered to be a precedent.
Cultural	<ul style="list-style-type: none"> Ensures Maori have continued access to this part of the Estuary, the Estuary being very important to them historically as a food gathering area. 	
Environmental	<ul style="list-style-type: none"> Ensures that the intrinsic environmental value of the area and the openness of the Estuary are maintained as far as possible. 	

	Benefits (current and future)	Costs (current and future)
Economic		<ul style="list-style-type: none"> • A one-off cost of up to \$30,000 may have to be expended to finance the required litigation. Money is available in the Greenspace Unit's Budget to pay these costs. • Continued maintenance of the area will be required if the land vests in the Council as Esplanade Reserve. This will need to be budgeted for in the Greenspace Eastern Area Maintenance Contract.
<p>Extent to which community outcomes are achieved: The community aspiration to retain public access to the land is achieved. Potentially the community's aspiration that the land be brought under public ownership may also be achieved.</p> <p>Impact on Council's capacity and responsibilities: There will be a small increase in the Council's capacity and responsibilities than there is at present (ie to develop and maintain the area) plus the one-off cost of initiating legal proceedings.</p> <p>Effects on Maori: It will ensure that Maori are able to continue to have access to this part of the Estuary.</p> <p>Consistency with existing Council policies: Consistent with the ethos of Council and Government policies of maintaining public access to and along foreshore areas, thereby ensuring the general public's enjoyment of foreshore areas.</p> <p>Views and preferences of persons affected or likely to have an interest: It has clearly been indicated by the Avon-Heathcote Estuary Ihutai Trust, the Christchurch Estuary Association Incorporated and other groups that the retention of this area for public access to the Estuary is important.</p> <p>Other relevant matters: Nil.</p>		

Maintain The Status Quo (If Not Preferred Option)

38. Maintaining the status quo, by doing nothing.

	Benefits (current and future)	Costs (current and future)
Social		<ul style="list-style-type: none"> • The general public's continued access to the Estuary foreshore in this part of the Estuary cannot be assured if Mr and Mrs Romerils' "adverse possession" claim proceeds and is successful. • Does not ensure that the community's aspiration that this land passes into public ownership is met.
Cultural		<ul style="list-style-type: none"> • Does not ensure that Maori have continued access to this part of the Estuary, the Estuary being very important to them historically as a food gathering area.
Environmental		<ul style="list-style-type: none"> • Does not ensure that the intrinsic environmental value of the area and the openness of the Estuary are maintained.

	Benefits (current and future)	Costs (current and future)
Economic	<ul style="list-style-type: none"> • Potentially a saving is made in the amount of money needed to be budgeted in the Greenspace Area Maintenance Contract if the Council does not gain title to the land. • A one-off cost of up to \$30,000 in respect of legal costs will not have to be expended if the Council decides not to initiate these proceedings. 	
<p>Extent to which community outcomes are achieved: The community's aspiration to ensure the land passes into Council ownership is not being actively acted upon and therefore is more at risk of not being achieved.</p> <p>Impact on Council's capacity and responsibilities: Nil</p> <p>Effects on Maori: By doing nothing the Council would not ensure that Maori are able to continue to have access to this part of the Estuary.</p> <p>Consistency with existing Council policies: By not issuing the legal proceedings recommended the ethos of the Council, and government policies of maintaining public access to foreshore areas, ensuring the general public's enjoyment of foreshore areas, would not be acted upon.</p> <p>Views and preferences of persons affected or likely to have an interest: By not issuing the suggested legal proceedings the Council would not be acting in compliance with the wishes of the community for the retention of public access across the land as has been strongly expressed by the Avon-Heathcote Estuary Ihutai Trust, the Christchurch Estuary Association Incorporated and other community groups.</p> <p>Other relevant matters: Nil.</p>		