

### 3. 13 THE SPUR – LICENCE TO OCCUPY LEGAL ROAD – PART ONE

<b>General Manager responsible:</b>	General Manager City Environment, DDI 941 8608
<b>Officer responsible:</b>	Asset and Network Planning Unit Manager
<b>Author:</b>	Robert O'Connor, Solicitor, Legal Services Unit

#### PURPOSE OF REPORT

1. The purpose of this report is to provide an overview of the circumstances concerning the grant by the Council of a Deed of Licence to the owners of the property at 13 The Spur, Sumner (Vincent Joseph De Lorenzo and Susan Graham Wilson) to occupy a portion of legal road (Nayland Street) for the purposes of a cableway base station.

#### EXECUTIVE SUMMARY

2. This report should be read in conjunction with Part Two of this report which is included in the public excluded agenda to be considered at the same meeting as this report. Part Two of this report contains additional advice from the Legal Services Unit to the Community Board.
3. On 8 November 2006 the Hagley/Ferrymead Community Board considered an application from the owners of 13 The Spur to erect a cableway base station and garage on legal road on Nayland Street. A copy of the 2006 staff report is attached to this report (refer **Attachment 1**).
4. The Community Board declined the part of the application relating to the garage, and resolved as follows with regard to the cableway base station:
  - (a) *To approve the application for the cableway compound structure only located on legal road adjoining 13 The Spur (Nayland Street) subject to the following conditions:*
    - (i) *Resource and building consents being obtained.*
    - (ii) *The owner being entirely responsible for the stability, safety and future maintenance of the bank, driveway and formation work associated with the structure.*
    - (iii) *The site being kept in a tidy condition at all times during the course of construction.*
    - (iv) *That the Ngaio tree, if removed, be replaced with an appropriate tree with all costs being borne by the applicant.*
  - (b) *To enter into a Deed of Licence for the proposed cableway compound with the owner of 13 The Spur (Nayland Street)."*
5. Paragraph 4 of the 2006 staff report on this matter stated that the owners of 13 The Spur had "obtained consent from the adjoining landowners for the location of the garage in front of their property and the cableway that runs parallel to their properties". However, the owners of the properties neighbouring 13 The Spur at 2 Nayland Street, 2 Aronui Track and 12 The Spur made a deputation to the Community Board meeting of 4 August 2010 and asserted that they did not in fact provide consent for the proposed cableway in 2006. They have requested that the Licence be cancelled.
6. Council staff have conducted an investigation into why paragraph 4 was included in the 2006 staff report and the staff advice concerning that matter is detailed in Part Two of this report.
7. In the 'Background' section of the 2006 staff report it is recorded that the application from the owner of 13 The Spur complied with the Council's applicable Structures on Streets Policy and met the other criteria recorded in that report. Accordingly, the staff recommendation was to approve the application. The criteria in the Structures of Streets Policy have not changed.

8. On the authority of the Community Board's 8 November 2006 resolution, a Licence to place the cableway compound structure on legal road has been issued by the Council's Property Team to the owners of 13 The Spur. A copy of the Licence is attached to this report (refer **Attachment 4**).
9. Under the Licence the Council as landowner of legal road authorises the owners of 13 The Spur to construct part of the cableway (the base station) on the legal road at the foot of the hill. The Licence cannot and does not operate as a general consent by the Council to the owner of 13 The Spur to construct the cableway in its entirety. Clause 21 of the Licence specifically provides that "*The Licensee acknowledges that the Structure will also encroach on areas which are subject to rights of way and other easements. The Licensee is solely responsible for obtaining all consents necessary from the owners of the dominant land having the benefit of the easements prior to the construction of the Structure on the Road. Council shall not be liable for any breach of the easements by the Licensee due to the construction of the Structure*".
10. The issuing of the Licence by the Council is only one of a number of milestones that the owners of 13 The Spur will need to achieve in order to be able to build the proposed cable car facility.
11. The proposed route of the cable car over the Licensee's land follows the route of an existing right of way easement which exists for the benefit of the properties at 2 Nayland Street, 2 Aranoni Track and 12 The Spur. The owners of 13 The Spur have acknowledged, in Clause 21 of the Licence and in their application for a Project Information Memorandum, that the proposed cableway encroaches on this right of way easement.
12. It is anticipated that the work required to construct the cableway, and potentially the operation of the cableway, will interfere with the right of way easement. The owners of 13 The Spur will therefore need to obtain the consent of the owners of 2 Nayland Street, 2 Aranoni Track and 12 The Spur under the easement before any work is undertaken that will affect the right of way. This is a civil matter to be resolved between the various landowners concerned and will not directly involve the Council.
13. The granting of the Licence has not interfered with the rights of the neighbouring property owners to object to the construction of the proposed cableway under the easement. As a matter of civil law, the owners of the neighbouring properties have the ability to legally object to the construction of the cableway under the terms of the easement benefiting their properties if that work interferes with their easement rights.
14. The Licence does not contain the Council's standard early cancellation provision allowing the Council to cancel for any reason on the giving of six months written notice. However, the Community Board does not have the delegated authority to cancel the Licence. A decision to cancel the Licence must be made by the full Council and may only be implemented in accordance with the provisions of the Property Law Act 2007.
15. The owners of 13 The Spur must also obtain a building consent and potentially a resource consent for the cable car. No applications have been received for building consent or resource consent in relation to the proposed cableway at the date of writing of this report.
16. It is relevant to the issue at hand to record that an existing cable car has in recent years been constructed on the southern boundaries of 12 and 13 The Spur and 2 Aranoni Track. Title searches of the properties at 2 Aranoni Track, 12 The Spur and 7 Clifton Terrace confirm that these properties have the benefit of easement rights to use that cableway that was granted in 2007.

17. The plans showing land parcels (refer **Attachment 2**) and a plan prepared by Eliot Sinclair showing proposed position of the full cable car facility (refer **Attachment 3**) are included with this report. A letter from solicitors acting for the owners of 13 The Spur dated 6 August 2010 (refer **Attachment 5**) is attached.
18. On one hand, the owners of 13 The Spur appear to have acted in good faith in applying to the Community Board for a grant of the licence and entering into that Licence.
19. On the other hand, the owners of the properties at 12 The Spur, 2 Nalyand Street and 2 Aranoni Track argue that they did not provide their consent before the 2006 Community Board resolution was adopted.
20. A number of options are available to the Community Board and the Council to deal with this matter. Details of these options are provided in this report, however additional commentary on these options is also contained in Part Two of this report.

#### **FINANCIAL IMPLICATIONS**

21. See Part Two of this report.

#### **Do the Recommendations of this Report Align with 2009-19 LTCCP budgets?**

22. Not applicable

#### **LEGAL CONSIDERATIONS**

##### **Licence**

23. Under the Licence the Council as landowner of the legal road authorises the owners of 13 The Spur to construct part of the cableway (the base station) on the legal road at the foot of the hill.
24. The Licence cannot and does not operate as a general consent by the Council to the owner of 13 The Spur to construct the cableway in its entirety.
25. The Licence was specifically entered into on the basis that the owners of 13 The Spur would be required to obtain all other approvals and consents required to enable the proposed cableway to be constructed. Specifically, clause 21 of the Licence provides that "*The Licensee acknowledges that the Structure will also encroach on areas which are subject to rights of way and other easements. The Licensee is solely responsible for obtaining all consents necessary from the owners of the dominant land having the benefit of the easements prior to the construction of the Structure on the Road. Council shall not be liable for any breach of the easements by the Licensee due to the construction of the Structure*".
26. The Licence does contain the Council's standard early cancellation provision allowing the cancellation of the Licence for any reason on the giving of six months written notice. However, the Community Board does not have the delegated authority to cancel the Licence. A decision to cancel the Licence must be made by the full Council and may only be implemented in compliance with the provisions of the Property Law Act 2007.

##### **Neighbours' easement rights**

27. The proposed route of the cable car falls within the legal boundaries of 13 The Spur, but follows the route of an existing right of way easement consisting of a walking track and steps. The application for the Project Information Memorandum received by the Council from Eliot Sinclair acting for the owners of 13 The Spur, states that provision has been made in the cable car plans to retain the walking track and steps, or to reconstruct them as necessary.

28. The right of way easement over 13 The Spur is for the benefit of the properties at 12 The Spur, 2 Nayland Street and 2 Arononi Track. If the right of way easement will be interfered with by either the construction process, or by the operation of the cableway following construction, the owners of 13 The Spur will need to obtain the consent of the owners of these properties under the easement. It therefore appears that on the basis of the information available to the Council, the neighbouring properties at 12 The Spur, 2 Nayland Street and 2 Arononi Track have a viable and straightforward remedy available to them if they do not wish the cableway to proceed. That remedy is that they can refuse to consent to an y request from the owner of 13 The Spur to disturb their easement rights.
29. If the cableway work was to be proceeded with by the owner of 13 The Spur without obtaining that consent the owners of these properties would have a civil remedy available to them by applying to the Court to enforce their easement rights.
30. Any breach of the neighbours' easement rights is a civil matter between the parties and would not involve the Council.

### **Regulatory consents required**

31. The cableway works will also require a building consent under the Building Act 2004. In addition it appears from the Project Information Memorandum issued to the owners of 13 The Spur that a resource consent under the Resource Management Act 1991 will also be required. At the date of writing this report no applications for a building consent or a resource consent have been received by the Council.
32. A resource consent application could possibly be processed on either a publicly notified or limited notification basis. If the application is notified this will provide an opportunity for affected residents to make submissions.
33. Whether a resource consent is required, and whether the application would be notified, cannot be determined with certainty at this stage. This will require an assessment of the final details of the cableway project against the relevant rules in the City Plan.
34. On the basis of the removal of a tree situated within the legal boundaries of 13 The Spur, the neighbours of 13 The Spur have suggested that work has already commenced on the construction of the cableway. The removal of an unprotected tree on private land is a matter exclusively for the owner of the land in question, unless that removal damages or undermines the property of another person. The neighbours acknowledged in their deputation to the Community Board on 4 August 2010 that the tree was situated within the legal boundaries of 13 The Spur. The Council is not aware of any work on the cableway being commenced, however if work has been undertaken that requires a resource consent or building consent the enforcement team will deal with these matters using the usual enforcement tools in the Resource Management Act 1991 and the Building Act 2004.

### **Have you considered the legal implications of the issue under consideration?**

35. Yes, see above and Part Two of this report

### **ALIGNMENT WITH LTCCP AND ACTIVITY MANAGEMENT PLANS**

36. Not applicable

### **Do the recommendations of this report support a level of service or project in the 2009-19 LTCCP?**

37. Not applicable.

#### **ALIGNMENT WITH STRATEGIES**

38. Not applicable

#### **Do the recommendations align with the Council's strategies?**

39. See above

#### **CONSULTATION FULFILMENT**

40. Section 78 Local Government Act 2002 requires the Community Board to take into account the views of all parties likely to be affected by its decision before any decision is made. This includes both the views of the owners of neighbouring properties and the views of the owners of 13 The Spur.
41. Accordingly, the parties likely to be affected by the decision have been advised that this report is to be considered by the Community Board and advised of their right to make a deputation to the Community Board meeting at which this report will be considered.
42. It is noted that representatives of the owners of a number of the properties neighbouring 13 The Spur made a deputation to the Community Board meeting of 4 August 2010.

#### **STAFF RECOMMENDATION**

It is recommended that the Hagley/Ferrymead Community Board acknowledges the deputations and submissions that it has received on the issue of the proposed cycleway at 13 The Spur and, recognising the civil remedies available to the parties to settle this issue, resolves to take no further steps at this time.

#### **CHAIRPERSON'S RECOMMENDATION**

#### **THE OPTIONS**

##### **Option 1 – Revoke the 8 November 2006 resolution**

43. If the Community Board wished to revoke the 8 November 2006 resolution it could do so. However, revocation of the resolution would have no impact on the Licence.
44. Standing Orders provide only two ways that a previous resolution of a Community Board may be revoked.
45. Firstly, Standing Order 3.9.15 provides that a resolution may be revoked if a notice of motion to that effect is given to the Chief Executive by the Community Board member wishing to move it at least 5 clear working days before the meeting at which it is proposed to consider the motion. In addition, the Notice of Motion must be signed by not less than one third of the members of the particular Community Board. The Chief Executive is then required to give the Community Board members at least 2 clear working days notice of the intended motion.
46. Secondly, Standing Order 3.9.18 provides that a Community Board meeting may, on a recommendation contained in a report by the Chairperson or Chief Executive, revoke all or part of a resolution previously passed at a meeting. At least two clear working days notice of any meeting to consider the revocation must be given to Community Board members and the notice of the meeting must be accompanied by details of the proposal to be considered.
47. Given the procedural matters referred to above, the option of revoking the 8 November 2006 resolution will not be available to the Community Board at the meeting when this report is considered. This option would require adoption of either of the two procedures outlined above and consideration of any proposal at a subsequent meeting.

### **Option 2 – Recommend to the Council that the Licence be cancelled**

48. The Licence does not contain the Council's standard early cancellation provision allowing the cancellation of the licence for any reason on the giving of six months written notice. However, the Community Board does not have the delegated authority to cancel the Licence. A decision to cancel the Licence must be made by the full Council and may only be implemented in compliance with the provisions of the Property Law Act 2007.
49. Staff do not recommend this option for the following reasons:
- (a) Under clause 21 of the Licence the owner of 13 The Spur expressly acknowledges that the cableway will encroach on areas which are subject to the rights of way easements and that he is solely responsible for obtaining all consents necessary from the owners of the dominant land having the benefit of the easements prior to the construction of the cable way.
  - (b) The owners of the neighbouring properties at 2 Nayland Street, 2 Aranoni Track and 12 The Spur appear on the information available to Council staff to have a remedy available to them under the right of way easement. If that easement will be interfered with by either the construction process, or by the operation of the cableway following construction, the owners of 13 The Spur will need to obtain the consent of the owners of these properties under the easement. The neighbouring properties at 12 The Spur, 2 Nayland Street and 2 Aranoni Track therefore have a viable and straightforward remedy available to them if they do not wish the cableway to proceed. That remedy is that they can simply refuse to consent to any request from the owner of 13 The Spur to disturb their easement rights. They would also be entitled to enforce their rights through the Court if necessary.
  - (c) Such a decision would not take account of the fact that the original application from the owner of 13 The Spur complied with the Council's applicable 'Structures on Streets Policy' and met the other criteria recorded in the 2006 report. It would also ignore the fact that the owner of 13 The Spur appears to have acted in good faith in applying to the Community Board for a grant of the licence and entering into that Licence
50. Additional reasons are detailed in Part Two of this report.

### **Option 3 – Recommend to the Council that the Licence be cancelled and recommence the Licence application process.**

51. This option is a viable option that could be considered by the Community Board and the Council.
52. However, staff do not recommend this option for the following reason:
- (a) The owners of the neighbouring properties at 2 Nayland Street, 2 Aranoni Track and 12 The Spur appear on the information available to Council staff to have a remedy available to them under the right of way easement. If that easement will be interfered with by either the construction process, or by the operation of the cableway following construction, the owners of 13 The Spur will need to obtain the consent of the owners of these properties under the easement. The neighbouring properties at 12 The Spur, 2 Nayland Street and 2 Aranoni Track therefore have a viable and straightforward remedy available to them if they do not wish the cableway to proceed. That remedy is that they can simply refuse to consent to any request from the owner of 13 The Spur to disturb their easement rights. They would also be entitled to enforce their rights through the Court if necessary.

53. Additional reasons are detailed in Part Two of this report.

#### **Option 4 – Take no further steps (the preferred option)**

54. The reasons why this is the preferred option are as follows:

- (a) On one hand, it appears that the owners of 13 The Spur have acted in good faith in applying to the Community Board for a grant of the licence and entering into that Licence. Their application complied with the applicable policy and met the criteria relevant at the time.
- (b) On the other hand, the owners of the properties at 12 The Spur, 2 Nayland Street and 2 Aranoni Track argue that they did not provide their consent before the 2006 Community Board resolution was adopted.
- (c) The owners of the neighbouring properties at 12 The Spur, 2 Nayland Street and 2 Aranoni Track have a remedy available to them under the right of way easement. If that easement will be interfered with by either the construction process, or by the operation of the cableway following construction, the owners of 13 The Spur will need to obtain the consent of the owners of these properties under the easement. The neighbouring properties at 12 The Spur, 2 Nayland Street and 2 Aranoni Track therefore have a viable and straightforward remedy available to them if they do not wish the cableway to proceed. That remedy is that they can refuse to consent to any request from the owner of 13 The Spur to disturb their easement rights. Further, they would be entitled to enforce that right through the Court if that was necessary.
- (d) Under clause 21 of the Licence the owner of 13 The Spur expressly acknowledges that the cableway will encroach on areas which are subject to the rights of way easements and that he is solely responsible for obtaining all consents necessary from the owners of the dominant land having the benefit of the easements prior to the construction of the cableway.
- (e) Accordingly, as the owners of the neighbouring properties have a civil remedy available to them to prevent or control the proposed cableway by acting to enforce their easement rights, the staff recommendation is that the Council should adopt a pragmatic stance and not take any steps to disturb the 2006 resolution or the Licence.

55. Additional reasons are detailed in Part Two of this report.

#### **Investigation into paragraph 4 of the 2006 staff report**

56. Paragraph 4 of the 2006 staff report on this matter stated that the owners of 13 The Spur had “obtained consent from the adjoining landowners for the location of the garage in front of their property and the cableway that runs parallel to their properties”. However, the owners of a number of the properties neighbouring 13 The Spur made a deputation to the Community Board meeting of 4 August 2010 and asserted that they did not in fact provide consent for the proposed cableway in 2006.

57. Council staff have conducted an investigation into why paragraph 4 was included in the 2006 staff report. It now appears that the staff member who wrote the report in 2006 misunderstood the Council’s obligations to consult with interested or affected persons. It appears that the report writer considered that the proposed garage affected the ‘frontager’ rights of the property at 8 The Spur and that the consent of that owner was therefore required. Council staff understand that consent was in fact obtained from the owner at 12 The Spur in relation to the proposed garage that was not proceeded with. However, as it was considered that the proposed cableway base station only impacted on the ‘frontager’ rights of 13 The Spur it was concluded that no further consents from other persons were required. ‘Frontager’ rights are the legal rights that a landowner possesses to access their property from all points of an adjacent legal road. It appears that the report writer was unaware of the Council’s obligations under section 78 of the Local Government Act 2002 to consider the views and preferences of persons likely to be affected by, or having an interest, in the matter.

58. New reporting templates and report approval processes have been implemented since 2006 to ensure that staff are aware of the Council’s consultation obligations under the Local Government Act 2002.

---