

5. REVOKING DELEGATED AUTHORITY

General Manager responsible:	General Manager Regulation and Democracy Services, DDI 941-8462
Officer responsible:	Legal Services Manager
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PURPOSE OF REPORT

1. At its meeting on 1 March 2007 the Council resolved:

"That the Council consider revoking the delegated authority of the Corporate Support Manager, in so far as it affects the property at 8 Waitikiri Drive and note that staff will report back on this matter."

2. This report is in response to that resolution.

EXECUTIVE SUMMARY

3. By resolution dated 23 October 1996, the Council delegated to the (now) Corporate Support Manager the authority to:

"Grant or decline, subject to any reasonable term or condition, consent to dealings with the Council's property including consent to the registration, variation and discharge of mortgages, easements, leases and subleases and their registration, caveats and other documents in similar dealings (excluding reserve land)."

4. In 2002, Mr and Mrs JPM and AFM Leenen (the Applicants) sought the Council's consent to a right of way easement over land owned by the Council at Bottle Lake forest. The applicants own a property adjoining that land.
5. The request was declined and since then Council staff have consistently advised the applicants that access to their property was not available across Council land.
6. Notwithstanding this advice, reiterated by the Corporate Support Manager in 2004, the applicants have continued to press for access to be granted. This has included approaches to the Mayor, Councillors, Community Board members and the Chief Executive.
7. In a report to the Burwood/Pegasus Community Board in December 2006, Council staff noted that this was a matter for Council staff to deal with and not an issue of governance. The report stated that the matter had been considered and reviewed by a number of Council officers since 2002 and that there was a high degree of objectivity reflected in the decisions made. The Board did not accept this advice and instead recommended that the Council consider revoking the Corporate Support Manager's delegated authority. This was adopted by the Council.
8. At the request of Councillor Sheriff the Chief Executive has reviewed the matter and concluded that the applicants should not be granted access over the Council's land.
9. There is nothing in the Local Government Act 2002 to prevent the Council from deciding to revoke the Corporate Support Manager's authority to make the decision that he made. However, for the reasons set out in this report, it is recommended that the Council should not do so.

FINANCIAL IMPLICATIONS

10. A decision to revoke the delegated authority granted to a Council officer would not in itself have any financial implications.
11. Any costs that would flow from that decision would be met by the applicants, apart from internal staff costs.

LEGAL CONSIDERATIONS

12. In 1989 the Waimairi District Council approved the subdivision of the property at 16B Waitikiri Drive. This was conditional upon one of the lots being amalgamated with the property at 8 Waitikiri Drive and one Certificate of Title being issued in respect of both of these lots. This was required to enable the subdivided land to have road access to Waitikiri Drive.
13. This condition was complied with and a single Certificate of Title was issued for both areas of land (Lots 1 and 3). Any further subdivision would require a right of way in favour of Lot 1 being created over Lot 3.
14. The applicants, current owners of the property at 8 Waitikiri Drive, purchased their property in 1994. They were aware of the amalgamation condition and the fact that if Lot 1 was to be subdivided the only road access available was across Lot 3 to Waitikiri Drive.
15. Despite this, the applicants have made many attempts to persuade the Council to grant access to Lot 1 through adjoining land owned by the Council that forms part of the Bottle Lake forestry area. Eventually, in the valid exercise of his delegated authority, the Corporate Support Manager reviewed the reasons for the Council declining the owners request. He found that the decision made by Council staff to decline the request for a right of way easement was the correct one.
16. This was eventually reported to the Burwood/Pegasus Community Board at the applicants' insistence. Notwithstanding the advice of staff that the decision to decline consent was appropriate, the Board has recommended that the Council consider revoking the Corporate Support Manager's delegated authority insofar as it affects the property at 8 Waitikiri Drive.
17. The Council's power of delegation is set out in Clauses 32AA–32B of Schedule 7 of the Local Government Act 2002. Clause 32(4) states that a Council officer to whom any responsibilities, powers or duties are delegated without confirmation by the Council may exercise or perform them in the like manner and with the same effect as the Council could itself have exercised or performed them. In the present case, the Corporate Support Manager has exercised the decision making power of the Council in accordance with the terms of the delegation granted to him.
18. So far as the right to revoke a delegation is concerned, there is nothing in the Act that specifically enables the Council to do this. Section 715(8) of the Local Government Act 1974 (now repealed) gave a local authority the power to revoke a delegation at will. Further, no delegation could prevent the exercise of any power by elected members.
19. There is no similar provision in the 2002 Act, although Clause 30(6) of Schedule 7 prevents the Council from rescinding or amending a decision made under a delegation by a committee, subcommittee or other subordinate decision-making body.
20. It is the view of the Legal Services Unit therefore that where the Council validly delegates its decision making power to a staff member then it follows that it can make a decision to revoke that delegation and take back the decision making power it had previously relinquished. Alternately it could amend the delegation by adding conditions to it.
21. In the present case, the Council could decide to revoke its decision to delegate to its Corporate Support Manager the authority to grant or decline a consent to easements in respect of Council owned property, leaving the other aspects of the delegation in place.
22. The Council could immediately re-delegate that authority, with the exception of the Council's interest in the land over which the right of way easement is sought (contained in Certificate of Title 348/274). The Council would then itself have to consider the matter of the applicants' application for consent to a right of way easement over the Council's land. Any process adopted by the Council for making its decision would have to comply with the consultation and decision-making obligations set out in the Local Government Act.

23. Whilst this may be possible, it is the firm view of the Legal Services Unit that it is not good practice and that elected members would be compromising the distinction between governance and management that properly exists in Local Government.
24. Professor K A Palmer in "local government law in New Zealand" has noted that:
- "The practice and extent of delegation of powers to officers may depend on the conventions of a particular local authority, and the leadership and management role which elected members adopt in relation to the officers. Members may tend to assume a greater management function and risk duplicating the role of senior officers. In principal members should act primarily as policy makers at a directorship level, and should not assume officer or administrative functions."*
25. Since 2002, Council staff have on more than one occasion, reviewed their advice to the applicants that the right of way easement would not be available. The Corporate Support Manager in the valid and proper exercise of his delegated authority formally declined to grant the easement in September 2004. In the ordinary course of events, that should have been the end of the matter.
26. Individuals refusing to accept a decision that is against their wishes is not a sufficient reason for elected members to consider revoking the authority that was given to a staff member to make that decision. There has been no new evidence put forward to suggest that the decision was not the right one. In fact, the stopping of the unformed road adjacent to all properties in, or off, Waitikiri Drive that share a rear boundary with the Bottle Lake forest recreational area is a clear indication that the Council's intention is that no road access to private dwellings would be provided across that land.
27. A decision to revoke would set a precedent that could be used by other people who are also unhappy at a valid decision made by Council staff in similar circumstances. It could also mean that the owners of other properties that share a rear boundary with Bottle Lake land could put pressure on Council staff for access as well. As indicated earlier, this is clearly not the Council's intention.
28. The applicants in this case have already built a house on the rear of their property. Building consent was granted in reliance on a plan submitted to the Council that included provision for road access to Waitikiri Drive. Sufficient width was shown on the plan for a driveway and noted on it was a statement that the existing office/garage was to be removed. By continuing to press for access across the Bottle Lake forest land, the applicants are indicating that they are not prepared to comply with a plan that they themselves prepared for the purposes of getting building consent.
29. An aspect of this matter that should not be overlooked is the possible effect of Section 138 of the Local Government Act 2002. Since the land over which access is sought is no longer designated as an unformed road, its primary status is as part of the Bottle Lake recreational area. Therefore, the Council would be required by Section 138 to consult on a proposal to dispose of any part of that land for example by granting an easement over it.

STAFF RECOMMENDATION

It is recommended that the Council resolve to confirm the decision made under delegation by the Corporate Support Manager in respect of an application for access over Council-owned land to the property at 8 Waitikiri Drive, Christchurch.

BACKGROUND (THE ISSUES)

30. This matter began when the Waimairi District Council granted consent to the owner of the property at 16B Waitikiri Drive to subdivide his land. The result was the creation of a section that adjoined Council land on part of one boundary and the rear of the property at 8 Waitikiri Drive on another.
31. A condition of the consent being granted was that the new section be amalgamated with the property at 8 Waitikiri Drive so that road access was obtained through that property. This was done and a new Certificate of Title for both lots was issued. A copy is attached.
32. If the then owner of the property at 8 Waitikiri Drive had not wished to purchase the section and amalgamate it with his existing property, the owner of the property at 16B Waitikiri Drive would have been required to provide road access to the section by way of a right of way to and from 16B Waitikiri Drive.
33. The applicants are the current owners of 8 Waitikiri Drive. They purchased the property in 1994, after the title was issued. Despite this, the applicants have advised the Council that they believed access to the rear portion of the property could be obtained from the road servicing the Burwood landfill site. Although there was nothing to support that view, the applicants apparently were of the understanding that if appropriate representation was made to the Council, such access would be considered.
34. This was entirely the applicants' own view. There is nothing to indicate that Council staff either discussed subdivision of their property with them or led them to believe that access across Council land would be considered.
35. This did not prevent the applicants from pursuing the matter. On 1 March 2002 they were advised that their application for access from the Burwood landfill had been declined.
36. Following a subsequent meeting with Council staff, the applicants were advised by letter dated 18 July 2002 that their application would not be approved.
37. There was further correspondence from the applicants. On 5 December 2002 the Council responded, setting out in considerable detail the reasons for their request being declined. It was reiterated that the Council had no obligation to provide access, nor did it wish to, and the original decision would remain. No new information had been provided.
38. Again, the applicants refused to accept the Council's decision. The applicants lodged a number of submissions to the City Plan hearings including one relating to the matter of access. However, they did not appear before the hearings panel. It was suggested by staff that their application could be addressed at the time they sought consent to subdivide their property, if that is what they wanted to do. The panel agreed with this view, noting that the decision sought was premature and should be addressed through the sub-division process. In yet another letter, dated 27 March 2003, the applicants were advised that a review committee of Council staff had not supported their application for a right of way easement.
39. Further attempts to get the Council staff to change their minds followed. The applicants complained to the Mayor. The Facility Assets Manager, who had delegated authority at the time, carried out another review of the matter. He advised the applicants by letter dated 3 September 2004 that the application for access had been declined.
40. Despite this, the applicants still continued their efforts to get the Council to reconsider its position. They again involved the Mayor, Councillors and the Chief Executive. The Corporate Support Manager reviewed the file and on 1 August 2005 advised the applicants that the previous decision was sound and that the Council would not support their application for access over Bottle Lake forestry land. He noted that "undoubtedly this is not the response you would have hoped for, but I trust you can understand that I have considered all relevant factors, other than private concerns and benefits, when making this decision".

41. The applicants then turned their attention to the Burwood/Pegasus Community Board. The Council's Property Unit was instructed to prepare a report which it duly did. The Board did not accept the Unit's conclusion that the matter had been considered and reviewed by a number of Council officers from at least 2002 and that the decision making progress had a high degree of independence and objectivity. The report stated that "obviously this is not Mr Leenen's preferred outcome and as a result he has not accepted the decision nor given up on his request".
42. That, essentially, is the problem. The applicants will not take "no" for an answer. This has resulted in the matter getting far more attention that it would otherwise have got.
43. In July 2006, whilst continuing to try and get the Council to change its mind, the applicants applied for and obtained consent to build a new house on the rear section of their property. The building has been completed and until recently the applicants have apparently been crossing the Council owned land to get access to it. The wire in a low wire and bollard fence was removed.
44. The wire was replaced, but when it was removed again within 24 hours, more substantial bollards were installed.
45. It should also be noted that the access sought by the applicants would connect with the landfill road on the landfill side of gates that close the road to the public at night and at weekends. The opening and closing of the gates is managed by the City Water and Waste Unit. Clearly there would be issues of security and public safety if the gates were opened to allow access to the applicants' property. Alternatively, the gates would have to be moved.
46. In their application for building consent, the applicants included a site plan that included a driveway from the rear of their property to Waitikiri Drive. It was of sufficient width for the purpose and complied with Council standards.
47. Also on the plan was a statement that the existing office/garage was to be removed and a new, replacement structure built elsewhere on the property. The applicants had previously advised Council staff, and elected members, that there was not enough room for a driveway and that Mr Leenen could not find a contractor prepared to demolish the office/garage.
48. Building consent for the dwelling was granted on the basis of the site plan submitted with the application. No impediment exists that would prevent the applicants from continuing with and completing the development of their property as outlined in the application.
49. For this reason, and those set out in this report, the Legal Services Unit view is that Councillors should not consider revoking the Corporate Support Manager's delegated authority in this matter. The applicants do not need access to their property over Council land. There is a viable alternative.
50. In February 2008 the Chief Executive, Tony Marryatt, reviewed the matter. He has advised the Legal Services Unit as follows:
 - (a) Since 2002 the applicants have been requesting access over Council land to their property at 8 Waitikiri Drive. Council staff, under delegated authority, have continued to deny such access.
 - (b) The original reason for refusing the application was that the area behind the applicants' property is stopped road, being managed as part of Bottle Lake Plantation, the stopped road being part of the fire break between the plantation and adjacent residential land.
 - (c) As a rule all applications for vehicle easements over reserve land are turned down. The reasons for this are:
 - (i) To protect the future use of the land;
 - (ii) Because formed roads are created for access to private properties.

- (d) Of concern is the precedent effect if access is given to properties over Council reserves when they already have access to a formed road.
- (e) The applicants applied for consent to develop the property at 8 Waitikiri Drive in mid 2006. The consent applied for clearly shows access from Waitikiri Drive to the new house at the back of the section. The plan accompanying the application describes demolishing the existing office and also the fall from the front to the back of the section. Council staff have approved both the width and the fall of the proposed access to the new house.
- (f) In summary, it would have been preferable for the applicants to obtain access to their property from the Burwood Landfill private road. They applied for and were denied access. The applicants then applied for consent to develop their property which was granted. The consent showed the demolition of existing buildings and access from Waitikiri Drive.

51. A decision to revoke an officer's delegation to enable a one-off decision to be made and then to reinstate it is an unusual step to take. There must be compelling reasons for elected members to cross the boundary between governance and management. Whether or not to grant an easement over Council land is clearly a management matter and one that has been dealt with hundreds of times without incident. Because two individuals do not accept a decision that goes against their wishes, is not sufficient reason to revoke the authority of a staff member to make that decision. To do so would undermine the confidence staff have that decisions made in the valid discharge of their delegated authority will be supported by elected members.

THE OBJECTIVES

52. The main objective of this report is to respond to the Council's request for staff to report back on the matter of whether or not the Council should consider revoking the delegated authority of the Corporate Support Manager in so far as it affects the property at 8 Waitikiri Drive.

THE OPTIONS

Option 1

53. The first option is to maintain the status quo and to do nothing. The decision of the Corporate Support Manager would remain in force. The applicants would continue with their development in accordance with the building consent granted by the Council.

Option 2

54. The second option is to revoke the Corporate Support Manager's delegated authority to grant or decline consent to easements over Council property. The delegation could then be reinstated without the ability to grant or decline consent to the right of way easement over the Council's land adjoining the property at 8 Waitikiri Drive. The owners of that property would then reapply to the Council for consent and this would be dealt with by elected members. In accordance with the decision-making requirements imposed on them by the Local Government Act 2002. They would be considering the same matters that staff have already considered.

55. If Councillors propose that the easement is to be granted the matter will have to be put out for public consultation. If the proposal is supported, the applicants would then have to apply for sub-division consent.

THE PREFERRED OPTION

Option 1

56. The first option is the preferred option.